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SUPREME COURT, U.S.

No. 98-132

In The

Supreme Court of the United States

October Term, 1997

WESTERN RESOURCES, INC.,
Receiver of the assets of the
Victor Muscat Testamentary Trusts,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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12 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 2

I. THE ELEVENTH AMENDMENT BARS CALIFORNIA'S SUIT AGAINST COURT-APPOINTED RECEIVER WRI 2

A. Court-Appointed Receiver WRI Is Acting As An Arm Of The Connecticut Superior Court 2

B. California's Claim For Injunctive Relief Against WRI Is Sufficient In And Of Itself To Bar The District Court's Exercise Of Jurisdiction 3

II. THE ISSUE WRI PRESENTS IS APPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI 5

A. Review By Writ Of Certiorari Is Appropriate Because The District Court Improperly Exercised Jurisdiction Over WRI 5

B. California's Arguments Regarding Grounds For Review Are Merely Diversionary And Do Not Address The Necessity Of Review Of The Court Of Appeals' Erroneous Application Of The Eleventh Amendment 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abril v. Virginia, 145 F.3d 182 (4th Cir. 1998) 5

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 6

Auer v. Robbins, 519 U.S. 452 (1997) 5

Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613 (1936) 3

Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of California, 656 F.2d 491 (9th Cir. 1981) 4

Francheschi v. Schwartz, 57 F.3d 838 (9th Cir. 1995) 2

Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996) 5

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 7

Mitchell v. Los Angeles Community College District, 861 F.2d (9th Cir. 1988) 2

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 2

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 6

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 5, 6

Porter v. Sabin, 149 U.S. 473 (1893) 3

Quillen v. Oregon, 127 F.3d 1136 (9th Cir. 1997) 2, 5

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 3, 4, 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page

Texas v. Walker, 142 F.3d 831 (5th Cir. 1998) 5

Worcester County Trust Company v. Riley, 302 U.S. 292 (1937) 4

STATE CASES

Tucker v. American Insurance Co., 3 Conn.App. 397, 488 A.2d 1278 (Conn.App. Ct. 1985) 3

Walsh v. Raymond, 58 Conn. 251, 20 A. 464 (Conn. 1889) 23

INTRODUCTION

In its Petition for Writ of Certiorari, Petitioner Western Resources, Inc. ("WRI"), a receiver appointed by the Connecticut Superior Court, set forth the grounds upon which it seeks review, the District Court's improper exercise of jurisdiction over WRI in suit brought by the State of California ("California"). WRI explained that this exercise of federal jurisdiction was in derogation of WRI's Eleventh Amendment immunity, which arises from WRI's service as a receiver appointed by the Connecticut Superior Court to manage the assets of the Muscat Trusts that the Superior Court now holds in custodia legis.

In its opposition, California no longer denies that WRI is acting as an arm of the Connecticut Superior Court, adopting instead the reasoning of the Ninth Circuit Court of Appeals in claiming that the suit to compel WRI (in its capacity as court-appointed receiver) to perform or to pay for performance of pollution remediation is not "against" WRI for purposes of Eleventh Amendment immunity. However, both the Court of Appeals and California are mistaken; settled federal authority holds that a claim for injunctive relief against a receiver is sufficient in and of itself to trigger Eleventh Amendment immunity.

California's opposition also argues that review is unnecessary because WRI's petition presents no conflict among the several Circuits (which WRI never claimed) and identifies no conflict with this Court's prior decisions (which WRI has done). California's arguments are diversionary – the District Court's mis-application of the Eleventh Amendment, erroneously affirmed by the Court of

Appeals' published decision, raises a significant jurisdictional issue justifying review. For all of the reasons set forth below, WRI respectfully requests that this Court grant WRI's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH AMENDMENT BARS CALIFORNIA'S SUIT AGAINST COURT-APPOINTED RECEIVER WRI

A. Court-Appointed Receiver WRI Is Acting As An Arm Of The Connecticut Superior Court

The Eleventh Amendment bars California's suit against WRI because, as set forth in WRI's petition, WRI is acting as an arm of the Connecticut Superior Court. *(Francheschi v. Schwartz,* 57 F.3d 838, 841 (9th Cir. 1995); *Quillen v. Oregon,* 127 F.3d 1136, 1138 (9th Cir. 1997).) The Eleventh Amendment is an absolute jurisdictional bar to the exercise of federal jurisdiction wherever it applies *(Quillen, supra),* and applies equally to federal and pendant state law claims brought in federal court. *(Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 120-121 (1984).) A claim of Eleventh Amendment immunity by a party such as WRI is judged by "the way state law treats the entity" and the extent to which the entity is controlled by the state. *(Mitchell v. Los Angeles Community College District,* 861 F.2d 828, 831 (9th Cir. 1988), *cert. denied,* 490 U.S. 1081.)

In this case, WRI is acting as an arm of the Connecticut Superior Court because, according to settled Connecticut law, WRI is managing trust assets which are *held by the Superior Court* in custodia legis. (*Walsh v. Raymond*, 58 Conn. 251, 20 A. 464, 464 (Conn. 1889); *Tucker v. American Insurance Co.*, 3 Conn. App. 397, 398, 488 A.2d 1278 (Conn. App. Ct. 1985).) As this Court has expressly recognized, a superior court "itself holds and administers [the receivership estate] through its receiver, as its officer." (*Porter v. Sabin*, 149 U.S. 473, 479 (1893); see also *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 297 U.S. 613, 619 (1936).) Furthermore, it is undisputed that the Connecticut Superior Court is in fact exercising close control over the management of the Muscat Trust assets it holds. (A-9-15.) Thus, contrary to the Court of Appeals' decision, WRI is entitled to assert Eleventh Amendment immunity because California's suit is not only "against" WRI, it is virtually a suit against the Connecticut Superior Court itself.

B. California's Claim For Injunctive Relief Against WRI Is Sufficient In And Of Itself To Bar The District Court's Exercise Of Jurisdiction

California no longer disputes that WRI is acting as an arm of the Connecticut Superior Court, adopting instead the Ninth Circuit's rationale that the suit is not "against" WRI for purposes of Eleventh Amendment immunity because WRI would not necessarily be liable for monetary damages or the costs of remediation. However, the whole point of Eleventh Amendment immunity is to protect the several States and their instrumentalities from *suit*, not merely from monetary judgments. (*Seminole Tribe*

of Florida v. Florida, 517 U.S. 44, 58 (1996).) Thus, it is settled that the Eleventh Amendment applies to suits for injunctive relief. (*Worcester County Trust Company v. Riley*, 302 U.S. 292, 296, 299-300 (1937).) In one case actually cited by California, the Ninth Circuit itself focused on the *absence* of any prayer for injunctive relief as obviating enforcement of Eleventh Amendment immunity. (*Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of California*, 656 F.2d 491, 497 (9th Cir. 1981).) By contrast, injunctive relief is a fundamental element of California's suit against WRI.

California's opposition fails adequately to address the issue of Eleventh Amendment immunity in light of WRI's potential susceptibility to the injunctive relief which California admits it is seeking. Instead, California argues (without a single citation to authority) that WRI's susceptibility to an *order* of injunctive relief is somehow a different issue than WRI's amenability to *suit* for injunctive relief. (See opposition, pp. 16-17, and footnote 12.)[1] However, California's argument is contrary to settled authority concerning the application of Eleventh Amendment immunity which holds that the purpose of the immunity is to protect a State and its instrumentalities from "the coercive process of judicial tribunals," not merely to protect them from court judgments, (*Seminole*

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[1] California makes this interesting argument at the same time that it acknowledges that WRI's compliance with any District Court order of injunctive relief would require the approval of the Connecticut Superior Court, the Court that holds the Muscat Trusts' assets in custodia legis, potentially placing WRI in the middle of a conflict between courts, exactly as WRI has argued since California filed suit.

Tribe, supra, 517 U.S. at 58; see also *Texas v. Walker,* 142 F.3d 831, ___ (5th Cir. 1998); *Abril v. Virginia,* 145 F.3d 182, ___ (4th Cir. 1998); *Harter v. Vernon,* 101 F.3d 334, 339 (4th Cir. 1996), *cert. denied,* 1997 Lexis 4081.)

II. THE ISSUE WRI PRESENTS IS APPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI

A. Review By Writ Of Certiorari Is Appropriate Because The District Court Improperly Exercised Jurisdiction Over WRI

Petition for writ of certiorari is the proper means for WRI to obtain review and reversal of the District Court's denial of summary judgment. The issue presented by WRI for review is as follows:

> "Whether the Eleventh Amendment to the United States Constitution bars the exercise of jurisdiction by a United States District Court against a receiver appointed by the superior court of another state to manage the assets of a trust held by the superior court in custodia legis." (Petition, p. i.)

As discussed above, the Court of Appeals' published decision affirming the District Court's denial of WRI's motion for summary judgment was erroneous because the Eleventh Amendment absolutely bars the District Court's exercise of jurisdiction in this situation. (*Quillen v. Oregon, supra* 127 F.3d at 1138.) Relief by petition for writ of certiorari is the appropriate remedy for a party erroneously subjected to suit in federal court in derogation of Eleventh Amendment immunity. (See, e.g., *Auer v. Robbins,* 519 U.S. 452 (1997); *Port Authority Trans-Hudson*

Corp. v. Feeney, 495 U.S. 299 (1990); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).) The issue presented by WRI's petition is therefore perfectly appropriate for review by petition for writ of certiorari.

B. California's Arguments Regarding Grounds For Review Are Merely Diversionary And Do Not Address The Necessity Of Review Of The Court Of Appeals' Erroneous Application Of The Eleventh Amendment

California's brief in response to WRI's petition does not dispute that improper exercise of jurisdiction in derogation of the Eleventh Amendment is subject to review through certiorari. Instead, California attacks the petition as raising no conflict between the circuits (see Opposition, pp. 11-13), a matter That WRI never suggested was the basis for its petition in the first place. However, although no decision other than the Ninth Circuit's published opinion in this action has determined the important Eleventh Amendment issue presented here, there are several Court of Appeals' decisions which support WRI's entitlement to Eleventh Amendment immunity, and they are cited in WRI's petition. (See Petition, pp. 8, 9, 11-15.)

California also argues that the District Court's exercise of jurisdiction was not contrary to any prior decisions of this Court (see Opposition, pp. 13-14), at the same time that it argues that there is no prior decision of this Court that precisely addresses the issue presented by this Petition. (See opposition, pp. 13-14, attempting to distinguish *Seminole Tribe of Florida v. Florida* (*supra*, 517

U.S. 44, 58), and *Hess v. Port Authority Trans-Hudson Corp.* (513 U.S. 30, 39 (1994)). California's argument fails because, as noted above and in WRI's petition, the District Court's denial of WRI's motion for summary judgment, affirmed by the Ninth Circuit Court of Appeals' published decision, is in fact contrary to this Court's prior interpretation of the Eleventh Amendment in *Seminole Tribe* and *Hess*.

Most importantly, however, there is absolutely no authority for the idea that this Court's review is limited to cases in which there is a conflict among the several Circuits or a decision in conflict with this Court's prior decisions. To the contrary, as noted above, the District Court's improper exercise of jurisdiction in violation of the Eleventh Amendment is sufficient in and of itself to justify review. In addition, WRI's particular situation, in which the District Court has exercised Jurisdiction over the receiver for a trust estate over which a state court has already exercised jurisdiction, a trust estate of whose assets the state court has actually taken possession in custodia legis, has not been addressed previously by this Court.[2] California's diversionary arguments therefore should not distract this Court's attention from the important jurisdictional issue that WRI's petition actually presents.

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[2] California also suggests that the issue should be left open to allow the several Court of Appeals to develop a consensus. (See Opposition, pp. 14-15.) California submits no authority for the notion that it would be improper for this Court to review this important jurisdictional issue now merely because the Ninth Circuit Court of Appeals is the only court to date to have misapplied the Eleventh Amendment in this manner.

CONCLUSION

Western Resources, Inc. respectfully urges this Court to grant its petition for certiorari.

Dated: September 14, 1998

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